CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 38 DECEMBER 8, 2004 NO. 50

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

Notice of Cancellation of Customs Broker Permit

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker local permits are canceled without prejudice.

Name	Permit #	Issuing Port
Evans, Wood and Mooring, Inc.	373	Los Angeles
MEC Transport Services Corp.	13618–P	San Francisco
Jose A. Mena	WTH	Miami
South Florida Customs Brokers, Inc.	GQ3	Miami
Exel Global Logistics, Inc.	20–02–233	New Orleans
Exel Global Logistics, Inc.	1101–02–4079	Philadelphia
MEC Transport Services Corp.	93031	Los Angeles
Kathleen R. Carlton	52–02–AMC	Miami
World Commerce Services Inc.	39–754	Chicago
Howard Fox	MM6	Chicago
Janet Bernal dba Happy Custom Brokers	52–03–AQB	Miami
Valerie Knapp-Banker	WFG	Miami
J.H. Bachmann, Inc.	805	New York
J.H. Bachmann, Inc.	39–W82	Chicago
J.H. Bachmann, Inc.	01–17–008	Savannah

DATED: November 15, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 26, 2004 (69 FR 68950)]

Cancellation of Customs Broker License Due to Death of the License Holder

AGENCY: Bureau of Customs and Border Protection, Department of Homeland Security

ACTION: General Notice

SUMMARY: Notice is hereby given that, pursuant to Title 19 of the Code of Federal Regulations § 111.51(a), the following individual Customs broker licenses and any and all permits have been cancelled due to the death of the broker:

Name	License #	Port Name
Frederic Alan Moede	10053	Los Angeles
Irvin Henry Shannon	01252	Nogales
Lawrence M. Lewis	03804	Norfolk

DATED: November 15, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 26, 2004 (69 FR 68951)]

Notice of Cancellation of Customs Broker License

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker licenses are canceled without prejudice.

Name	License #	Issuing Port
Evans, Wood and Mooring, Inc.	11425	Los Angeles
South Florida Customs Brokers, Inc.	16898	Miami
ADCO I.T.S., Inc.	14361	Laredo
MEC Transport Services Corp.	13618	Los Angeles
J.H. Bachmann, Inc.	11765	New York

DATED: November 15, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 26, 2004 (69 FR 68951)]

Notice of Cancellation of Customs Broker National Permit

AGENCY: Bureau of Customs and Border Protection, U.S. Department of Homeland Security

ACTION: General Notice

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the Customs Regulations (19 CFR 111.51), the following Customs broker national permits are canceled without prejudice.

Name	Permit #	Issuing Port
J.H. Bachmann, Inc.	04–00064	Headquarters
MEC Transport Services Corp.	99–00265	Headquarters

DATED: November 15, 2004

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, November 26, 2004 (69 FR 68951)]

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, November 24, 2004,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Sandra L. Bell for MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF SILYMARIN (MILK THISTLE) AND LEUCOANTHOCYANIN

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security

ACTION: Notice of proposed modification of a tariff classification ruling letter and revocation of treatment relating to the classification of silymarin (milk thistle) and leucoanthocyanin.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that CPB intends to modify a ruling concerning the tariff classification of silymarin (milk thistle) and leucoanthocyanin, under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CPB intends to revoke any treatment previously accorded by CPB to substantially identical transactions. Comments are invited on the correctness of the proposed actions.

DATE: Comments must be received on or before January 7, 2005.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulation and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at 799 9th St. N.W., Washington, D.C., during regular business hours. Arrange-

ments to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, (202) 572–8784.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625 (c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of silymarin (milk thistle) and leucoanthocyanin.

Although in this notice CPB is specifically referring to New York Ruling Letter (NY) 814027, dated February 2, 1996, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. This notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs

intends to revoke any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP s previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

The classification of silymarin and leucoanthocyanin in NY 814027 contradicts that of two other rulings, Headquarters Ruling Letter (HQ) 964338, dated March 28, 2001, and HQ 966566, dated October 21, 2003. In those rulings, respectively, silymarin and leucoanthocyanin were correctly classified in subheading 3824.90.28, the provision for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included: Other: Other: Mixtures containing 5% or more by weight of one or more aromatic or modified aromatic substances: Other." NY 814027 is set forth as Attachment "A" to this document. We are proposing to modify NY 814027 to make it consistent with the classifications of silymarin and leucoanthocyanin in HQs 964338 and 966566.

CBP, pursuant to 19 U.S.C. 1625(c)(1), intends to modify NY 814027, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 967099, set forth as Attachment "B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: November 19, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
NY 814027
February 2, 1996
CLA-2-13:RR:NC:FC:238 814027
CATEGORY: Classification
TARIFF NO.: 1302.19.4040

BRIAN S. GOLDSTEIN, ESQ.
TOMPKINS & DAVIDSON
One Astor Plaza
1515 Broadway, 43rd Floor
New York, NY 10036–8901

RE: The tariff classification of four vegetable extracts, imported in bulk form, from Italy

DEAR MR. GOLDSTEIN:

In your letter dated August 17, 1995, on behalf of your client, Indena USA Inc., you requested a tariff classification ruling.

The four subject products, which your client describes as "standardized herbal extracts", consist of four plant extracts, namely: Gingko biloba dry extract; Milk thistle (Silybum marianum); Leucoanthocyanins [(grape seed) Vitis vinifera]; and Bilberry (Vaccinium myrtillus). You have submitted flow charts from the manufacturer outlining the solvent extraction process used for each product, and have indicated in your letter that these extracts will be imported in bulk-powder form. You further indicate that, subsequent to importation and sale by your client, the extracts are combined with other ingredients and further processed into capsules and other similar forms for retail sale. The applicable subheading for the four subject products will be 1302.19.4040, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Vegetable saps and extracts: Other: Ginseng; substances having anesthetic, prophylactic or therapeutic properties: Other: Other." The rate of duty will be 1.3 percent ad valorem.

This merchandise may be subject to the regulations of the Food and Drug Administration. You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (301) 443–6553.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212–466–5770.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967099
CLA–2 RR:CR:GC 967099 AM
CATEGORY: CLASSIFICATION
TARIFF NO.: 1302.19.4040, 3824.90.2800

BRIAN S. GOLDSTEIN, ESQ.
TOMPKINS & DAVIDSON
One Astor Plaza
1515 Broadway, 43rd Fl.
New York, NY 10036–8901

RE: Modification of NY 814027; the tariff classification of Silymarin (milk thistle) and Leucoanthocyanin

DEAR MR. GOLDSTEIN:

This is in regard to New York Ruling Letter (NY) 814027, dated February 2, 1996, regarding the classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of silymarin (milk thistle) and leucoanthocyanin. That ruling held that the products were classified in subheading 1302.19.4040, HTSUS, the provision for "Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products: Vegetable saps and extracts: Other: Ginseng; substances having anesthetic, prophylactic or therapeutic properties: Other: Other."

The classification of silymarin and leucoanthocyanin (also known as grape seed extract) in NY 814027 contradicts that of two other rulings, Headquarters Ruling Letter (HQ) 964338, dated March 28, 2001, and HQ 966566, dated October 21, 2003. In those rulings, respectively, silymarin and leucoanthocyanin were correctly classified in subheading 3824.90.28, HTSUS, the provision for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Mixtures containing 5% or more by weight of one or more aromatic or modified aromatic substances: Other." Hence, we intend to modify NY 814027 to bring it in to conformity with the Headquarters rulings.

FACTS:

The silymarin here in issue is a yellow powder which contains 80% mixture of isomers of silymarin (silybin, silicristin and silidianin). Silymarin 80% is produced from milk thistle seeds.

The leucoanthocyanin here in issue is a brownish powder consisting of 90–95% oligomeric proanthocyanidin (OPC). OPC is a mixture of proanthocyanidin compounds in different degrees of polymerization. Some of the OPCs are catechins with a chemical formula of $C_{15}H_{14}O_6$ (The Merck Index, 11th ed.), dimers (two degrees), trimers (three degrees), etc. Due to these varying states of polymerization, the OPCs are not comprised of a single chemical compound, although the main chemical structures are identical. Leucoanthocyanin can be produced from either pine bark or grape seed.

According to flow charts submitted by the importer, all of the products are obtained through extraction and refining processes that target a particular family of chemicals in the plant such as isomers of silymarin or OPCs.

ISSUE:

What is the proper classification, under the HTSUS, of the silymarin and leucoanthocyanin extracts?

LAW AND ANALYSIS:

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any related section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUS. See T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

Furthermore, "it is a well-established principle that classification of an imported article must rest upon its condition as imported." E. T. Horn Company v. United States, Slip Op. 2003–20, (CIT, 2003), (citing Carrington Co. v. United States, 61 CCPA 77, 497 F.2d 902, 905 (CCPA 1974), United States v. Baker Perkins, Inc., 46 CCPA 128, (1959)).

The HTSUS provisions under consideration are as follows:

1302:	Vegetable saps and extracts; pectic substances, pectinates and pectates; agar-agar and other mucilages and thickeners, whether or not modified, derived from vegetable products:
	Vegetable saps and extracts:
1302.19	Other:
	Ginseng; substances having anesthetic, prophylactic or therapeutic properties:
1302.19.40	Other

* * * * * * * * * * * *

3824	Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included:

3824.90 Other:

Other:

Mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances:

3824.90.28 Other

EN 13.02 states, in pertinent part, the following:

(A) Vegetable saps and extracts.

The heading covers saps and extracts (vegetable products usually obtained by natural exudation or by incision, or extracted by solvents), **provided** that they are not specified or included in more specific headings of the Nomenclature (see list of exclusions at the end of Part (A) of this Explanatory Note).

These saps and extracts differ from the essential oils, resinoids and extracted oleoresins of heading 33.01, in that, apart from volatile odoriferous constituents, they contain a far higher proportion of other plant substances (e.g., chlorophyll, tannins, bitter principles, carbohydrates and other extractive matter).

The saps and extracts classified here include:

(1) Opium, the dried sap of the unripe capsules of the poppy (Papaver somniferum) obtained by incision of, or by extraction from, the stems or seed pods. It is generally in the form of balls or cakes of varying size and shape. However, concentrates of poppy straw containing not less than 50 % by weight of alkaloids are excluded from this heading (see Note 1 (f) to this Chapter).

* * * * *

(4) Pyrethrum extract, obtained mainly from the flowers of various pyrethrum varieties (e.g., Chrysanthemum cinerariaefolium) by extraction with an organic solvent such as normal hexane or "petroleum ether".

* * * * *

(11) Quassia amara extract, obtained from the wood of the shrub of the same name (Simaroubaceae family), which grows in South America. Quassin, the principal bitter extract of the wood of the Quassia amara, is a heterocyclic compound of heading 29.32.

* * * * *

(18) Papaw juice, whether or not dried, but not purified as papain enzyme. (The agglomerated latex globules can still be observed on microscopic examination.) Papain is excluded (heading 35.07).

* * * * *

(20) Cashew nutshell extract. The polymers of cashew nutshell liquid extract are, however, excluded (generally heading 39.11).

* * * * * * *

Examples of excluded preparations are: . . .

(iv) Intermediate products for the manufacture of insecticides, consisting of pyrethrum extracts diluted by addition of mineral oil in such quantities that the pyrethrins content is less than 2 %, or with other substances such as synergists (e.g., piperonyl butoxide) added (heading 38.08).

All four of the substances in NY 814027 are obtained by sophisticated means such as solvent-solvent extraction, distillation, dialysis, chromatographic procedures, electrophoresis, etc. These processes result in a substance containing a targeted chemical compound or compounds along with ubiquitous plant material that need not be further removed for the manufacturers purposes.

Heading 1302, HTSUS, describes vegetable extracts. The EN's provide that vegetable products are usually obtained by natural exudation or by incision, or extracted by solvents. Furthermore, the EN distinguishes products of heading 1302 from products of 3301 by the amount of plant material they contain. Research into the extracts described by the ENs, however, reveals a variety of extraction and refining techniques. For instance, in HQ 963848, dated April 20, 2002, CBP took note of the EN that allows pyrethrum products containing over 2% pyrethrum to remain classified in heading 1302, HTSUS, in classifying a 50% pyrethrum product in heading 1302, HTSUS. We did so even though the original extracted oleoresin had been further purified removing much of the variety of material in the pyrethrum plant and thereby concentrating the pyrethrum content.

However, there appears to be a limit on the amount of purification that can occur before the product is classified in a later chapter. For instance, EN 13.02, explicitly excludes certain refined extracts of opium, quassia amare, papaw juice, and cashew nut shell liquid, once the refining process concentrates a certain group of chemical compounds to a particular point. Hence, poppy straw concentrates containing more than 50% alkaloids are excluded from heading 1302. Likewise, quassin, a chemical compound extracted and refined from the quassia amara shrub is classified in Chapter 29. Papain enzyme, once purified from the extraction process of papaw juice, is classified as an enzyme of Chapter 37. And polymers extracted and refined from cashew nut shell liquid are classified in Chapter 39 as polymers.

Following the reasoning in our prior rulings, and the tenet that we must classify goods as imported, we note that the leucoanthocyanin consists of over 90% mixtures of oligomeric proanthocyanidins (OPCs) and the silymarin consists of well over 80% of isomers of silymarin. Therefore, silymarin and leucoanthocyanin are relatively pure chemical products, albeit not separately defined chemical compounds of Chapter 29. Hence, they are classified in heading 3824, HTSUS, as a chemical product.

As opposed to the silymarin and leucoanthocyanin extracts, the other two products classified in NY 814027 (ie. gingko biloba and bilberry extracts) are mixtures consisting of only approximately 25% of a targeted compound or compounds. The remaining constituents of these extracts consist of a variety of plant substances and a small amount of solvent. Although the process of extraction is similar, gingko biloba and bilberry extracts contain a relatively greater variety of the original plant matter than silymarin and leucoanthocyanin extracts and therefore remain classified in heading 1302, HTSUS.

HOLDING:

NY 814027 is modified thus: silymarin and leucoanthocyanin are classified in subheading 3824.90.2800, HTSUSA, the provision for "Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included: Other: Other: Mixtures containing 5% or more by weight of one or more aromatic or modified aromatic substances: Other." The General column 1 rate of duty is 6.5%.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov.

EFFECT ON OTHER RULINGS:

NY 814027 is modified as outlined above.

MYLES B. HARMON,
Director,
Commercial Rulings Division.

19 CFR PART 177

REVOCATION OF A RULING LETTER AND OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN STEREOS INCORPORATING A DUAL CASSETTE DECK

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security

ACTION: Notice of revocation of a ruling letter and treatment relating to the tariff classification of certain stereos incorporating a dual cassette deck.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection ("CBP") is revoking a ruling letter and any treatment on substantially identical transactions pertaining to the tariff classification of certain stereos incorporating a dual cassette deck under the Harmonized Tariff Schedule of the United States ("HTSUS"). Notice of this proposed action was published in the CUSTOMS BULLETIN on October 6, 2004. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouses for consumption on or after February 6, 2005.

FOR FURTHER INFORMATION CONTACT: Tom Peter Beris, General Classification Branch, at (202) 572–8789.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to CBP obligations under 19 U.S.C 1625 (c)(1), a notice was published on October 6, 2004, in Vol. 38, No. 41 of the CUSTOMS BULLETIN, proposing to revoke a ruling letter pertaining to the tariff classification of certain stereos incorporating a dual cassette deck. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBPs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice may raise the rebuttable pre-

sumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking HQ 950522 to the extent that it does not reflect the interpretation set forth by CBP in HQ 950882, *et. al.*, and the analysis set forth in HQ 967280, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by the CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

DATED: November 19, 2004

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachment

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967280
CLA-2 RR: CR: GC 967280 TPB
November 19, 2004
CATEGORY: Classification
TARIFF NO.: 8527.31.40

J. KEVIN HORGAN
PILLSBURY, MADISON & SUTRO
Suite 1100
1667 K Street, N.W.
Washington, D.C. 20001

RE: Alternating Current Combination Stereos Incorporating a Radio, a Dual Cassette Deck Tape Player/Recorder, a Record Player, and a Graphic Equalizer

DEAR MR. HORGAN:

This is in regard to HQ 950522, issued to you on August 24, 1992, pertaining to the classification of alternating current ("AC") combination stereos under the Harmonized Tariff Schedule of the United States ("HTSUS"). That ruling classified the merchandise under subheading 8527.31.50, HTSUS, as reception apparatus for radiobroadcasting, combined in the same housing, with sound recording or reproducing apparatus, other radiobroadcast receivers, combined with sound recording or reproducing apparatus, other, other combinations incorporating tape recorders.

We have recently had an opportunity to review HQ 950522 in light of other rulings issued by Customs and Border Protection ("CBP") and for the reasons set forth below find that it is in error and the proper classification of the merchandise is under subheading 8527.31.40, HTSUS, which provides

for reception apparatus for radiobroadcasting, combined in the same housing, with sound recording or reproducing apparatus, other radiobroadcast receivers, combined with sound recording or reproducing apparatus, other, combinations incorporating tape players which are incapable of recording.

Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation was published on October 6, 2004, in Volume 38, Number 41 of the CUSTOMS BULLETIN. No comments were received in response to this notice.

FACTS:

The merchandise is described in HQ 950522 as follows:

> The merchandise in question is combination stereos incorporating an AM/FM radio, a dual cassette deck (with one play only tape well and one play/record tape well), a record player, and a graphic equalizer. This stereo system is incapable of operating without an external source of power (i.e., it is "nonportable").
>
> The dual cassette deck contains two tape wells. One well has tape heads for recording and playing, and the other well has a tape head for playing only. The dual cassette deck features the ability to record from one tape to another, to record from the tuner, turntable or other source, and to play.
>
> The dual cassette deck wells are driven by the same motor, which is incorporated in the cassette deck assembly mounted behind the tape deck section of the main system housing. The dual cassette deck wells share the same output and many common parts, such as a chassis assembly, gears, roller assemblies and numerous rods, levers and springs. The dual cassette deck wells also share certain controls such as switches for dubbing speed and headphones.

ISSUE:

Are the combination AC stereos properly classified under subheading 8527.31.40, HTSUS, which provides for combination stereos incorporating tape players which are incapable of recording, or under subheading 8527.31.50, HTSUS, which provides for other combinations incorporating tape recorders?

LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

Heading 8527, HTSUS, in pertinent part, describes reception apparatus for radiobroadcasting, whether or not combined in the same housing with sound recording or reproducing apparatus. There is no dispute that the stereo combinations under consideration are described by this heading.

GRI 6 governs the classification of goods in the subheadings of a heading. GRI 6 provides, in pertinent part, that the classification of goods in the subheadings of a heading is determined according to the terms of the subheadings. In the instant case, the competing subheadings are as follows:

8527.31.40 Combinations incorporating tape players which are incapable of recording

8527.31.50 Other combinations incorporating tape recorders

HQ 90522 held that the goods at issue were classified under subheading 8527.31.50, HTSUS, which provides for reception apparatus for radiobroadcasting, combined in the same housing, with sound recording or reproducing apparatus, other radiobroadcast receivers, combined with sound recording or reproducing apparatus, other, other combinations incorporating tape recorders. That ruling relied upon HQ 087179, dated May 31, 1991, which held that certain audio systems incorporating dual cassette decks were properly classified under subheading 8527.31.50, HTSUS, and not 8527.31.40, HTSUS, because the dual cassette decks shared many of the same components and were required to be considered as one single unit. In reaching its conclusion, HQ 087179 stated that "[u]nlike subheading 8527.31.40, which restricts the tape players described to those which are incapable of recording, subheading 8527.31.50 does not restrict the tape recorders described to those which are incapable of playing."

However, HQ 087179 was revoked by HQ 952271 on August 24, 1992. HQ 952271 held that based upon further analysis and research, the audio systems incorporating dual cassette decks were properly classified under subheading 8527.31.40, which provides for combinations incorporating tape players which are incapable of recording. The reasoning for this shift in position was reflected in HQ 950882, dated August 7, 1992, which indicated that 8527.31.40, HTSUS, contemplates that we consider the respective functions of the tape player and recorder separately. This reasoning was mirrored in a number of CBP rulings. *See* HQ 952416, HQ 952417, HQ 951932, HQ 952229, all dated August 24, 1992; HQ 952098, dated October 15, 1992; HQ 952501, dated December 1, 1992.

For the reasons set forth in 950882, *et. al.*, we find that the stereos presently at issue are properly classified under subheading 8527.31.40, HTSUS. For that reason, CBP is revoking HQ 950522.

HOLDING:

For the reasons set forth above, the Thompson Consumer Electronics, Inc., "General Electric," combination stereos are classified under subheading 8527.31.4080, HTSUSA, as reception apparatus for radiobroadcasting, combined in the same housing, with sound recording or reproducing apparatus, other radiobroadcast receivers, combined with sound recording or reproducing apparatus, other, combinations incorporating tape players which are incapable of recording. The 2004 column one, general rate of duty is 1%. Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the Internet at *www.usitc.gov*.

EFFECT ON OTHER RULINGS

HQ 950522, dated August 24, 1992, is revoked. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,
Director,
Commercial Rulings Division.

REVOCATION OF A RULING LETTER, MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN HATS OF FINE ANIMAL HAIR

AGENCY: Bureau of Customs & Border Protection; Department of Homeland Security.

ACTION: Notice of revocation of a tariff classification ruling letter, modification of two tariff classification ruling letters and revocation of treatment relating to the classification of certain hats of fine animal hair.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs & Border Protection (CBP) is revoking a ruling letter and modifying two ruling letters relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of certain hats of fine animal hair. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical transactions. Notice of the proposed revocation and modification was published in the *Customs Bulletin*, Volume 38, Number 42, on October 13, 2004. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 6, 2005.

FOR FURTHER INFORMATION CONTACT: Brian Barulich, Textiles Branch: (202) 572–8883.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**."

These concepts are premised on the idea that in order to maximize voluntary compliance with customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published in the Customs Bulletin, Vol. 38, No. 42, dated October 13, 2004, proposing to revoke New York Ruling Letter (NY) J85862, dated July 22, 2003, to modify NY H83073, dated August 3, 2001, and NY I80194, dated April 29, 2002, and to revoke any treatment previously accorded by CBP to substantially identical transactions. No comments were received in response to this notice.

As stated in the notice of revocation and modification, the notice covered any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised CBP during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C.1625 (c)(2)), as amended by section 623 of Title VI, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical transactions should have advised CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY J85862, CBP classified three knit hats made of 70 percent cashmere and 30 percent silk, with fur trimming, in subheading 6505.90.3090, HTSUSA, as being "of wool." In NY H83073, CBP classified a beret style hat made of alpaca wool fabric in subheading

6505.90.4090, HTSUSA, as being "of wool." In NY I80194, CBP classified two cable knit hats made of 70 percent angora hair, twenty percent rabbit hair, and ten percent nylon in subheading 6505.90.3090, HTSUSA, as being "of wool." Based on our review of NY J85862, NY H83073, and NY I80194, we find that the hats referred to in the above paragraph are made of "fine animal hair" and are not "of wool." Accordingly, they should be classified in subheading 6505.90.9045, HTSUSA, which provides for "Hats and other headgear . . . : Other: Other, Other: Of fine animal hair."

Pursuant to 19 U.S.C. 1625 (c)(1), CBP is revoking NY J85862 and modifying NY H83073 and NY I80194 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analyses set forth in proposed Headquarters Ruling Letter (HQ) 967314, HQ 967315, and HQ 967316. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

DATED: November 19, 2004

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967314
November 19, 2004
CLA–2: RR:CR:TE: 967314 BtB
CATEGORY: Classification
TARIFF NO.: 6505.90.9045

MR. RICHARD LOCURTO
CASSIN
150 West 30th Street, 5th Floor
New York, NY 10001

RE: Tariff classification of certain knit and fur hats from China; Revocation of NY J85862

DEAR MR. LOCURTO:

On July 22, 2003, our New York office issued to you New York Ruling Letter (NY) J85862, classifying three knit and fur hats from China under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA).

Upon review of that ruling, we have found that the classifications provided for the three hats are in error. This ruling letter, HQ 967314, hereby revokes NY J85862.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY J85862 was published in the *Customs Bulletin*, Volume 38, Number 42, on October 13, 2004. No comments were received in response to this notice.

FACTS:

We are referring to the classifications provided for the "Style CA1022R" hat, the "Style CA1022M" hat, and the "Style CA1022F" hat (collectively, the "hats"). The hats are identical in style, but are made with different types of fur which is attached to the outside of the crown. When the hats are viewed, you see the knit portion on the top of the head and the fur around the circumference of the head.

The hats have a knit crown of 70% cashmere and 30% silk. The "Style CA1022R" hat has rabbit fur attached to the crown, while the "Style CA1022M" has mink fur, and the "Style CA1022F" has fox fur.

In NY J85862, the hats were classified in subheading 6505.90.3090, HTSUSA, which provides for: "Hats and other headgear . . . : Other: Of wool: Knitted or crocheted or made up from knitted or crocheted fabric, Other: Other."

ISSUE:

What is the classification of the hats?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Chapter 51 of the HTSUSA covers wool, fine or coarse animal hair, horsehair yarn and woven fabric. Note 1 to Chapter 51 reads, in pertinent part:

1. Throughout the tariff schedule:

   (a) "Wool" means the natural fiber grown by sheep or lambs;

   (b) "Fine animal hair" means the hair of alpaca, llama, vicuna, camel, yak, Angora, Tibetan, **Kashmir** or similar goats (but not

common goats), rabbit (including Angora rabbit), hare, beaver, nutria or muskrat[.][1]

* * *

(Emphasis added).

Section XI, Note 2(A), HTSUSA, states, in pertinent part, that "[g]oods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material." Subheading Note 2(A) to Section XI, HTSUSA, states that "[p]roducts of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials." Additional U.S. Rule of Interpretation 1(d), HTSUSA, provides that "the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named."

It should be understood that Section XI, Note 2(A) applies to only material and only to the chapters and headings listed therein while Subheading Note 2(A) to Section XI makes Section Note 2(A) applicable to articles of textile material classifiable in Section XI. Further, Additional U.S. Rule of Interpretation 1(d) then makes Subheading Note 2(A) applicable to textile articles outside Section XI. Consequently, as the hats are textiles articles in which cashmere predominates by weight over silk, we will classify the hats as if consisting wholly of cashmere.

The EN to heading 6505 state that hats are classified in that heading regardless of whether they have been lined or trimmed. We consider the fur attached to the crown of each of the hats to be trimming. Therefore, the fur does not affect the classification of the hats.

In NY J85862, the hats were classified as being "of wool" in error. The articles are made of "fine animal hair" (i.e., the hair of the Kashmir goat) as defined in Note 1(b) to Chapter 51, HTSUSA, not "wool" as defined in Note 1(a) to Chapter 51, HTSUSA. Also see NY K85242, dated June 15, 2004, in which we classified a 100% cashmere hat in subheading 6505.90.9045, HTSUSA, which provides for, among other things, textile hats and other headgear of fine animal hair.

HOLDING:

The "Style CA1022R" hat, the "Style CA1022M" hat, and the "Style CA1022F" hat are classified in subheading 6505.90.9045, HTSUSA, which provides for "Hats and other headgear . . . : Other: Other, Other: Of fine animal hair." The general rate of duty for these style numbers will be 20.7 cents per kilogram plus 7.5 percent *ad valorem*. The textile category designation is 459.

NY J85862, dated July 22, 2003, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

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[1] Kashmir goats are also known as "cashmere goats" and their hair is also known as "cashmere."

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, which is available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967315
November 19, 2004
CLA–2: RR:CR:TE: 967315 BtB
CATEGORY: Classification
TARIFF NO.: 6505.90.9045

MR. ROGER EVANS
LA LLAMA ENTERPRISES LTD.
2416 Black Franks Drive
Nanaimo, BC V9T 3K5
Canada

RE: Tariff classification of a certain hat from Peru; Modification of NY H83073

DEAR MR. EVANS:

On August 3, 2001, our New York office issued to you New York Ruling Letter (NY) H83073, classifying two scarves and one hat from Peru under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon review of that ruling, we have found that the classification provided for the hat is in error. This ruling letter, HQ 967315, hereby modifies NY H83073 in regard to the classification of that hat.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY H83073 was published in the *Customs Bulletin*, Volume 38, Number 42, on October 13, 2004. No comments were received in response to this notice.

FACTS:

We are referring to the classification provided for the "Style A–017 beret hat." The hat is a "beret style hat with a button at the top and a fabric lin-

ing." The outer shell of the hat is composed of woven alpaca wool fabric. The composition of the fabric lining is not known.

In NY H83073, the hat was classified in subheading 6505.90.4090, HTSUSA, which provides for: "Hats and other headgear . . . : Other: Of wool: Other, Other: Other."

ISSUE:

What is the classification of the hat?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Chapter 51 of the HTSUSA covers wool, fine or coarse animal hair, horsehair yarn and woven fabric. Note 1 to Chapter 51 reads, in pertinent part:

1. Throughout the tariff schedule:

   (a) "Wool" means the natural fiber grown by sheep or lambs;

   (b) "Fine animal hair" means the hair of **alpaca**, llama, vicuna, camel, yak, Angora, Tibetan, Kashmir or similar goats (but not common goats), rabbit (including Angora rabbit), hare, beaver, nutria or muskrat[.]

* * *

(Emphasis added).

The woven alpaca wool fabric shell imparts the essential character to the hat.[1] Furthermore, the EN to heading 6505 state that hats are classified in that heading regardless of whether they have been lined. In NY H83073, the hat was classified as being "of wool" in error. The hat is made of "fine animal hair" (i.e., the hair of the alpaca) as defined in Note 1(b) to Chapter 51, HTSUSA, not "wool" as defined in Note 1(a) to Chapter 51, HTSUSA. Also see NY G83565, dated November 13, 2002, in which we classified two hats composed of knitted alpaca fabric in subheading 6505.90.9045, HTSUSA, which provides for, among other things, textile hats and other headgear of fine animal hair.

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[1] While we have recognized that linings do impart desirable and, sometimes, necessary features to apparel articles, it is generally the outer shell which creates the article and, thus, imparts the essential character. See, e.g., HQ 952437, dated October 23, 1992.

HOLDING:

The "Style A–017 beret hat" is classified in subheading 6505.90.9045, HTSUSA, which provides for "Hats and other headgear . . . : Other: Other, Other: Of fine animal hair." The general rate of duty for the hat will be 20.7 cents per kilogram plus 7.5 percent *ad valorem*. The textile category designation is 459.

NY H83073, dated August 3, 2001, is hereby modified in regard to the classification of the "Style A–017 beret hat." In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, which is available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY,
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967316
November 19, 2004
CLA–2: RR:CR:TE: 967316 BtB
CATEGORY: Classification
TARIFF NO.: 6505.90.9045

MR. CHARLES D. ASHEAR
PARIS ASIA, LTD.
350 Fifth Avenue - Floor 70
New York, New York 10118

RE: Tariff classification of certain hats from China; Modification of NY I80194

DEAR MR. ASHEAR:

On April 29, 2002, our New York office issued New York Ruling Letter (NY) I80194 to Mr. John B. Pellegrini, counsel for Paris Asia, Ltd., classifying two cable knit hats and a headband from China under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). As you requested, we are copying Mr. Pellegrini on this ruling letter. Upon review of NY I80194, we have found that the classifications provided for the two hats

are in error. This ruling letter, HQ 967316, hereby modifies NY I80194 in regard to the classification of those hats.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of NY I80194 was published in the *Customs Bulletin*, Volume 38, Number 42, on October 13, 2004. No comments were received in response to this notice.

FACTS:

We are referring to the classifications provided for the "Style 9576" and "Style 7580" hats. The Style 9576 is an envelope-style cable knit hat with tassels at the front and back. Style 7580 is a helmet-style cable knit hat. Both hats are made of 70 percent angora hair, 20 percent rabbit hair, and 10 percent nylon.

In NY I80194, the hats were classified in subheading 6505.90.3090, HTSUSA, which provides for: "Hats and other headgear . . . : Other: Of wool: Knitted or crocheted or made up from knitted or crocheted fabric, Other: Other."

ISSUE:

What is the classification of the hats?

LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied, in order. The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

Chapter 51 of the HTSUSA covers wool, fine or coarse animal hair, horsehair yarn and woven fabric. Note 1 to Chapter 51 reads, in pertinent part:

1. Throughout the tariff schedule:

   (a) "Wool" means the natural fiber grown by sheep or lambs;

   (b) "Fine animal hair" means the hair of alpaca, llama, vicuna, camel, yak, Angora, Tibetan, Kashmir or similar goats (but not common goats), rabbit (including Angora rabbit), hare, beaver, nutria or muskrat[.]

*   *   *

Section XI, Note 2(A), HTSUSA, states, in pertinent part, that "[g]oods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other

single textile material." Subheading Note 2(A) to Section XI, HTSUSA, states that "[p]roducts of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials." Additional U.S. Rule of Interpretation 1(d), HTSUSA, provides that "the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named."

It should be understood that Section XI, Note 2(A) applies to only material and only to the chapters and headings listed therein while Subheading Note 2(A) to Section XI makes Section Note 2(A) applicable to articles of textile material classifiable in Section XI. Further, Additional U.S. Rule of Interpretation 1(d) then makes Subheading Note 2(A) applicable to textile articles outside Section XI. Consequently, as the hats are textiles articles in which angora hair predominates by weight, we will classify the hats as if consisting wholly of angora hair.

In NY I80194, the hats were classified as being "of wool" in error. The hats are in chief weight of "fine animal hair" (i.e., angora hair) as defined in Note 1(b) to Chapter 51, HTSUSA, not "wool" as defined in Note 1(a) to Chapter 51, HTSUSA.

HOLDING:

The "Style 9576" and "Style 7580" hats are classified in subheading 6505.90.9045, HTSUSA, which provides for "Hats and other headgear . . . : Other: Other, Other: Of fine animal hair." The general rate of duty for the hats will be 20.7 cents per kilogram plus 7.5 percent *ad valorem*. The textile category designation is 459.

NY I80194, dated April 29, 2002, is hereby modified in regard to the classification of these styles of hats. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Textile Status Report for Absolute Quotas, which is available on the CBP website at www.cbp.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local CBP office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

Slip Op. 04–137

PACIFIC CIGAR, CO., Plaintiff, v. UNITED STATES, Defendant.

PUBLIC VERSION

Before: WALLACH, Judge
Court No.: 04–00130

[Plaintiff's Application For Fees and Other Expenses Pursuant to the Equal Access to Justice Act is denied.]

Decided: November 10, 2004

Hodes Keating & Pilon, (*Michael Hodes* and *Lawrence R. Pilon*), for Plaintiff Pacific Cigar Co.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *David S. Silverbrand*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant United States.

OPINION

WALLACH, Judge:

I
Introduction

This matter is before the court on Plaintiff's Application For Fees and Other Expenses Pursuant To The Equal Access To Justice Act ("Plaintiff's Application"). Plaintiff Pacific Cigar, Co. ("Pacific") moves for attorney's fees and expenses following a stipulated order of dismissal.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(h) (2004).

II
Background

This is a Pre-Importation Ruling matter under 28 U.S.C. § 1581(h) involving Pacific, which imports cigars from the Philippines and the Dominican Republic.

On July 29, 2003, the Bureau of Customs and Border Protection ("CBP" or "Customs") seized a shipment of Pacific's merchandise alleging that the goods were marked with a logo consisting of the Great Seal of the United States or the Presidential Seal, thus violating 18 U.S.C. § 713(a)–(b) (2003).[1] Pacific brought this case challenging two related CBP rulings, HQ 475073 issued on January 12, 2004, and HQ 475468 issued on March 9, 2004, claiming that the rulings were arbitrary, capricious, and contrary to law.

On March 19, 2004, Plaintiff filed its Summons and Complaint along with a Motion to Accelerate Compliance with CIT Rule 73.3(a), to Shorten Defendant's Response Time under CIT Rule 12(a) and to Grant Precedence under CIT Rule 3(g)(6) ("Plaintiff's Motion"). The parties signed a Settlement Agreement, which took effect on May 11, 2004,[2] in which CBP agreed, *inter alia*, to withdraw Ruling Letters HQ 475073 and HQ 475468.[3] On May 14, 2004, Plaintiff, on consent, filed a proposed Order of Dismissal pursuant to USCIT Rule 41(a)(2). On May 25, 2004, the court signed Plaintiff's proposed Or-

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[1] Pursuant to 18 U.S.C. § 713(a)–(b),

> (a) Whoever knowingly displays any printed or other likeness of the great seal of the United States, or of the seals of the President or the Vice President of the United States, or the seal of the United States Senate, or the seal of the United States House of Representatives, or the seal of the United States Congress, or any facsimile thereof, in, or in connection with, any advertisement, poster, circular, book, pamphlet, or other publication, public meeting, play, motion picture, telecast, or other production, or on any building, monument, or stationery, for the purpose of conveying, or in a manner reasonably calculated to convey, a false impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality thereof, shall be fined under this title or imprisoned not more than six months, or both.
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> (b) Whoever, except as authorized under regulations promulgated by the President and published in the Federal Register, knowingly manufactures, reproduces, sells, or purchases for resale, either separately or appended to any article manufactured or sold, any likeness of the seals of the President or Vice President, or any substantial part thereof, except for manufacture or sale of the article for the official use of the Government of the United States, shall be fined under this title or imprisoned not more than six months, or both.

[2] In the Ruling Letter HQ 476090, CBP stated that the Settlement Agreement took effect on May 11, 2004. In Plaintiff's Application at 1, the Plaintiff stated that the Defendant entered into the Settlement Agreement on May 10, 2004. The Settlement Agreement at Paragraph IX itself states that "[t]he Effective Date of this Settlement Agreement is the date of counsel for Pacific's receipt of a fully-executed copy of this Settlement Agreement." The effective date of the Settlement Agreement was prior to the Order of Dismissal.

[3] The Settlement Agreement, Exhibit 1 to Plaintiff's Application, entails no admission of liability nor any fee allocation. The Settlement Agreement states that it is "in full satisfaction of any and all claims, demands, and obligations of every kind with respect to the subject matter of the Action, and without admission of liability by either party. . . ." Settlement Agreement at 1. Furthermore, it provides that "[n]otwithstanding any other provision in this Agreement to the contrary, the parties agree that Pacific is preserving its right to apply to the court for an award of fees, costs and expenses under the EAJA, 28 U.S.C. § 2412. The parties neither admit nor deny that Pacific qualifies or is otherwise entitled to any such award." *Id.* at 3.

der of Dismissal, granting Plaintiff leave to withdraw its pending Motion to Accelerate and dismissing the action.

On June 22, 2004, Plaintiff filed an Application under the Equal Access to Justice Act ("EAJA") in which it claimed that it was a "prevailing party," pursuant to 28 U.S.C. § 2412(d)(1)(B) (2004). In its Opposition to Plaintiff's Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Defendant's Opposition") on July 22, 2004, Defendant argued that Plaintiff failed to establish that it was a prevailing party. Defendant's argument centers on the Supreme Court's rejection of the catalyst theory of recovery[4] as explained in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). Defendant argues in the alternative that if the court grants Plaintiff's EAJA application, it should reduce the amount of attorney's fees and expenses as unreasonably overstated and excessive. On August 23, 2004, Plaintiff filed its Reply to Defendant's Response to Plaintiff's Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Plaintiff's Reply"), arguing that its application was based not on the catalyst theory, but on the argument that "the totality of the circumstances brings Plaintiff's EAJA claim within the 'consent decree' type of resolution. . . ." Plaintiff's Reply at 3–4.

III
Plaintiff's Claim Does Not Merit Attorney's Fees Under EAJA

The EAJA states that fees and expenses must be awarded if "(1) the claimant is a prevailing party; (2) the government's position during the administrative process or during litigation was not substantially justified; (3) no special circumstances make an award unjust; and (4) the fee application is timely and supported by an itemized fee statement." *Former Emples. of Tyco Elecs., Fiber Optics Div. v. United States*, Slip Op. 04–118 at 14–15, 2004 Ct. Int'l Trade LEXIS 116 (Sept. 16, 2004) (citing 28 U.S.C. § 2412(d)(1)(A)–(B)).[5] Defendant has not claimed that the CBP's position was substantially justified, no special circumstances have been brought to the court's atten-

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[4] Under the catalyst theory a party can be deemed "prevailing" whenever the lawsuit brings about the desired change in the defendant's conduct, even if the defendant's conduct is voluntary, and the suit is dismissed as moot.

[5] The EAJA, 28 U.S.C. § 2412(d)(1)(A)–(B), states that:

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

tion, and Plaintiff's Application was timely filed and adequately supported. Thus, the only issue currently before the court is whether Plaintiff is entitled to be considered a "prevailing party" for purposes of the EAJA.

Plaintiff states that it was a "prevailing party," for purposes of 28 U.S.C. § 2412(d)(1)(B), in that it achieved the objective it sought when it commenced this litigation. Plaintiff's Application at 1. Specifically, Plaintiff claims that the rulings which it argued in its complaint were "null and void" and "could not be enforced" have now been withdrawn pursuant to the Settlement Agreement. *Id.* Plaintiff states that "[t]he Court . . . dismissed this case pursuant to CIT Rule 41(a)(2) after it was informed of the settlement." *Id.* In its Reply, Plaintiff argues that, although it would clearly be a prevailing party under the discredited catalyst theory, its application was based not on the catalyst theory, but rather on "the totality of the circumstances bring[ing] Plaintiff's EAJA claim within the 'consent decree' type of resolution. . . ." Plaintiff'sReply at 3–4. Plaintiff states that "the particular facts and circumstances of this case: the nature and language of the order of dismissal, the settlement agreement and the procedures *required* to implement the settlement, bring the Plaintiff's EAJA claim within the 'consent decree' category of cases for which EAJA awards are permitted." *Id.* at 5 (emphasis in original). Plaintiff argues that because the Order of Dismissal refers to the Settlement Agreement and includes a key provision of it, it constitutes a consent decree, bestowing the requisite "judicial imprimatur" on the settlement. *Id.* (quoting *Buckhannon*, 532 U.S. at 605). Plaintiff further reasons that because the Order of Dismissal implicitly requires remand back to Customs to enforce the Settlement, the court retains ancillary jurisdiction to enforce the settlement if necessary. *Id.* Plaintiff also finds significance in Customs' memorandum withdrawing the ruling letters, wherein Customs takes notice of the CIT case. Plaintiff thus concludes that retention of jurisdiction, together with the language of the Order of Dismissal, provide the requisite "judicial imprimatur" required under *Buckhannon* to establish Plaintiff as a prevailing party. *Id.*

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

Defendant responds in its Opposition that Plaintiff failed to establish that it was a prevailing party. Defendant suggests that its stipulation to dismiss, although accomplishing what Plaintiff sought, represented a voluntary change in conduct, which lacks the necessary "judicial imprimatur" to rise to the level of a judicially sanctioned change in the legal relationship of the parties. Defendant's Opposition at 3–4. Defendant claims that Plaintiff relies on a dismissal order which "does not constitute the 'court-ordered change in the legal relationship of the parties' expressly required by [*Brickwood Contrs., Inc. v. United States*, 288 F.3d 1371, 1380 (2002), *cert. denied*, 537 U.S. 1106, 123 S. Ct. 871, 154 L. Ed. 2d 775 (2003)], because Customs is not required to take any specific action pursuant to the Court's order of dismissal. Any actions which Customs agreed to in a settlement agreement are *independent of* the Court's order and not part of the record of these proceedings." Defendant's Opposition at 6 (emphasis in original). Defendant thus argues that because the Supreme Court's rejection of the catalyst theory has been found to apply to EAJA claims, Plaintiff's application for fees must be denied. *Id.* at 4 (citing *Brickwood*, 288 F.3d. at 1380).

The Supreme Court has stated that the phrase "prevailing party" does not "[authorize] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Buckhannon*, 532 U.S. at 606. To be a prevailing party the party must "receive at least some relief on the merits," which "[alters] . . . the legal relationship of the parties." *Former Emples. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1364 (Fed. Cir. 2003) (quoting *Buckhannon*, 532 U.S. at 603–06). In *Buckhannon*, the Court provided two examples of such an alteration in the legal relationship between the parties: an enforceable judgment on the merits and a court-ordered consent decree. 532 U.S. at 605. "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* (emphasis in original). The Court further stated that "[a]lthough a consent decree does not always include an admission of liability by the defendant, . . . it nonetheless is a court-ordered 'change [in] the legal relationship between [the plaintiff] and the defendant.'" *Id.* at 604 (citing *Texas State Teachers Assn. v. Garland Indep. School Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486 103 L. Ed. 2d 866 (1989)). However, the Court specified that a party who benefits from a settlement may be considered a prevailing party for purposes of obtaining attorney's fees if the settlement is "enforced through a consent decree" or where "the

terms of the agreement are incorporated into the order of dismissal."[6] *Id.*

Plaintiff here is not entitled to "prevailing party" status under the EAJA. The Order of Dismissal states:

> "[t]he Court having been informed by the parties that they have entered into a written settlement agreement, the key provision of which is the agreement of the Defendant to withdraw the rulings which are the subject of this action, and the parties further desiring that this matter be dismissed pursuant to order entered under CIT Rule 41(a)(2), it is hereby . . . ordered that this action is dismissed."[7]

Plaintiff finds legal significance in the Court's reference to the settlement agreement and its key provision. The question before the court is whether this language rises to the level of a settlement agreement enforced through a consent decree, pursuant to *Buckhannon*. It does not.

On the date the Order of Dismissal was issued, the court had taken no notice of the terms of the Settlement Agreement beyond noting in the Order of Dismissal — using language submitted by the parties — that the parties had informed the court of the Settlement's existence and that the Settlement required Defendant to withdraw certain rulings. No copy of the Settlement Agreement was filed with the court with the proposed Order of Dismissal, nor was the court informed in any fashion other than the language of the proposed order. In fact, only upon making its application for fees did Plaintiff provide a copy of the Settlement Agreement as an attachment to its Application. Thus any language in, or procedures arising from, the Settlement are not relevant to determining whether Plaintiff prevailed.

Plaintiff finds significance in the fact that the Order of Dismissal was issued pursuant to USCIT Rule 41(a)(2). The rule states that "an action shall not be dismissed by the plaintiff unless upon order of the court, and upon such terms and conditions as the court deems proper." USCIT Rule 41(a)(2). The court in this case has set no terms

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[6] The Court took pains to distinguish private settlements from consent decrees, specifically that "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." *Buckhannon*, 532 U.S. at 604, n.7 (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994).

[7] Pursuant to USCIT Rule 41(a)(2),

(a) Voluntary Dismissal; Effect Thereof.

> (2) By order of Court. Except as provided in paragraph (1) of this subdivision (a), an action shall not be dismissed by the plaintiff unless upon order of the court, and upon such terms and conditions as the court deems proper. . . . Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

or conditions, nor was it asked to consider any. The Order of Dismissal stipulates only that Plaintiff is granted leave to withdraw its motion and that the case is dismissed. Thus, the Order of Dismissal does not provide for oversight of the Settlement Agreement by the court, or for enforcement of its terms.

Plaintiff argues that the facts and circumstances of the instant case fall within the 'consent decree' category of cases. The court finds that the facts more closely mirror the circumstances described by the Supreme Court in rejecting the catalyst theory in *Buckhannon*: any actions on the part of the Defendant were taken voluntarily and not as a result of any rulings or orders by the court. There has been no relief granted on the merits to alter the legal relationship of the parties. Thus, the Plaintiff cannot be considered a prevailing party in this action and fails to meet the first requirement for fees under the EAJA.

IV
Conclusion

For the foregoing reasons, Plaintiff's Application is denied.

Slip Op. 04–147

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

UNITED STATES STEEL CORPORATION and ISPAT INLAND INC., Plaintiffs, v. UNITED STATES, Defendant, and USINAS SIDERURGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERURGICA PAULISTA, COMPANHIA SIDERURGICA NACIONAL, THAI COLD ROLLED STEEL SHEET PUBLIC COMPANY LIMITED, ISCOR, LTD., NIPPON STEEL CORPORATION, JFE STEEL CORPORATION, SUMITOMO METAL INDUSTRIES, LTD., KOBE STEEL, LTD., NISSHIN STEEL COMPANY, LTD., EREGLI DEMIR VE CELIK FAB. T.A.S., and SHANGHAI BAOSTEEL GROUP CORPORATION, Defendant-Intervenors.

Cons. Ct. No. 00–00151

[ITC's negative injury remand determination sustained.]

Date: November 18, 2004

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*) for plaintiffs United States Steel Corporation and Ispat Inland Inc.

James M. Lyons, Acting General Counsel, *Marc A. Bernstein*, Acting Asst. General Counsel for Litigation, U.S. International Trade Commission (*Michael Diehl*), for defendant United States.

Willkie Farr & Gallagher LLP (*William H. Barringer, James P. Durling, Kenneth J. Pierce, Matthew R. Nicely, Christopher A. Dunn,* and *Robert E. DeFrancesco*) for defendant-intervenors Usinas Siderurgicas de Minas Gerais S/A, Companhia Siderurgica Paulista, Companhia Siderurgica Nacional, Thai Cold Rolled Steel Sheet Public Company Limited, Nippon Steel Corporation, JFE Steel Corporation, Sumitomo Metal Industries, Ltd., Kobe Steel, Ltd., and Nisshin Steel Company, Ltd.

Wilmer Cutler Pickering LLP (*Kristin H. Mowry*) for defendant-intervenor Iscor, Ltd.

Law Offices of David L. Simon (*David L. Simon*) for defendant-intervenor Eregli Demir ve Celik Fab. T.A.S.

Greenberg Traurig, LLP (*Philippe M. Bruno*) for defendant-intervenor Shanghai Baosteel Group Corporation.

OPINION

GOLDBERG, Senior Judge: This case is before the Court following remand to the United States International Trade Commission ("ITC"). In *Bethlehem Steel Corp. v. United States*, 27 CIT ___, 294 F. Supp. 2d 1359 (2003) ("*Bethlehem I*"), familiarity with which is presumed, the Court remanded the ITC's determinations with respect to plaintiffs Bethlehem Steel Corporation, Ispat Inland Inc., LTV Steel Company, Inc., United States Steel Corporation, and National Steel Corporation[1] in *Certain Cold-Rolled Steel Products From Argentina, Brazil, Japan, Russia, South Africa, and Thailand*, 65 Fed. Reg. 15008 (Mar. 20, 2000), *Certain Cold-Rolled Steel Products From Turkey and Venezuela*, 65 Fed. Reg. 31348 (May 17, 2000), and *Certain Cold-Rolled Steel Products From China, Indonesia, Slovakia, and Taiwan*, 65 Fed. Reg. 44076 (July 17, 2000) (collectively "*Final Determinations*").

In *Bethlehem I*, the Court found that the ITC's interpretation of the captive production provision, *see* 19 U.S.C. § 1677(7)(C)(iv), was not in accordance with law. Specifically, the Court determined that the ITC's definition of "internal transfers" was unreasonable. Accordingly, the Court remanded the *Final Determinations* to the ITC to define "internal transfers" consistent with the will of Congress. The Court also instructed the ITC that, if it found the captive production provision to be applicable on remand, it would be required to consider primarily the merchant market in its "material injury" analysis under 19 U.S.C. §§ 1677d(b) and 1673d(b).[2]

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[1] Plaintiffs Bethlehem Steel Corporation and National Steel Corporation were voluntarily dismissed from this action in an order entered by the Court on July 7, 2004. Plaintiff LTV Steel Company, Inc. was voluntarily dismissed from this action in an order entered by the Court on November 18, 2004.

[2] The Court also instructed the ITC to clarify on remand how it complied with the statutory framework of both 19 U.S.C. § 1677e(a) and 19 U.S.C. § 1677m(d) for applying facts otherwise available. This issue is not presently before the Court since the ITC afforded the domestic producers and purchasers an opportunity to provide additional data during the remand investigations, and the parties no longer dispute whether the ITC complied with the statutory framework for applying facts otherwise available.

The ITC duly complied with the Court's order. After allowing the domestic producers and purchasers to provide additional data relating to the captive production provision, the ITC issued the Views of the Commission on Remand (Apr. 30, 2004) ("*Remand Results*"). In the *Remand Results*, the ITC determined that the captive production provision was applicable, but further found that the domestic industry was not materially injured, or threatened with material injury, by reason of imports of certain cold-rolled steel products that the United States Department of Commerce found to be subsidized and/or sold at less than fair value in the United States.

United States Steel Corporation ("U.S. Steel") submitted Comments on the U.S. International Trade Commission's Redetermination Pursuant to Court Remand ("Pl.'s Comments"), and the ITC submitted Reply Comments in Defense of its Remand Determination ("ITC's Reply"). Defendant-Intervenors also submitted a Response to Plaintiffs' Comments ("Def.-Intvrs.' Response").[3]

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). After due consideration of the parties' submissions, the administrative record, and all other papers had herein, and for the reasons that follow, the Court sustains the *Remand Results.*

I. *STANDARD OF REVIEW*

The Court must sustain the *Remand Results* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citation omitted). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (citation omitted).

The reviewing court may not, "even as to matters not requiring expertise . . . displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In this regard, "the court may not reweigh the evidence or substitute its judgment for that of the ITC." *Dastech Int'l, Inc. v. USITC*, 21 CIT 469, 470, 963 F. Supp. 1220, 1222 (1997).

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[3] The response was submitted on behalf of Nippon Steel Corporation, JFE Steel Corporation, Sumitomo Metal Industries, Ltd., Kobe Steel, Ltd., Nisshin Steel Co., Ltd., and Thai Cold Rolled Steel Sheet Public Co., Ltd.

II. *DISCUSSION*

A. The ITC Reasonably Concluded that the Subsidized and/or LTFV Imports Did Not Affect Domestic Prices.

All parties agree that "[t]he central issue in these investigations is the role, if any, of subject imports in the price declines in the domestic market." *Remand Results* at 17; Pl.'s Comments at 4; Def.-Intvrs.' Response at 2. In evaluating the price effects of the subject imports, the ITC examines whether:

> (I) there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii).

1. Evidence of Underselling Is Not a Per Se *Indication of Injury.*

U.S. Steel points to the pricing data for three specific items collected by the ITC, which "leaves no doubt that subject imports almost always undersold the domestic like product[.]" Pl.'s Comments at 4–5. From 1996 to 1997, the ITC made 268 comparisons and found 211 instances of underselling. *Id.* at 5. Similarly, from 1998 to the third quarter of 1999, the ITC made 319 comparisons and found 287 instances of underselling. *Id.* According to U.S. Steel, "[t]hese data – which must be considered by law – *compel* the conclusion that subject imports had a significant depressing effect on domestic prices." *Id.* (emphasis added).

To the extent U.S. Steel contends that evidence of underselling is a *per se* indication of injury, its argument fails. *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Manufacturers v. United States*, 22 CIT 520, 526, 15 F. Supp. 2d 918, 924 (1998). "Evidence of underselling alone is legally insufficient to support an affirmative injury determination." *BIC Corp. v. United States*, 21 CIT 448, 458, 964 F. Supp. 391, 401 (1997), *aff'd*, App. No. 97–1443 (Fed. Cir. 1998). "Rather, the [ITC] has a statutory mandate to consider not only whether the subject imports have significantly undersold the domestic like product, but also how the subject imports effect [sic] the prices of the domestic like product." *Id.*

The ITC has considerable discretion in interpreting the evidence and determining the overall significance of any particular factor in its analysis. *Coalition*, 22 CIT at 527, 15 F. Supp. 2d at 925. "The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the

absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide." S. Rep. No. 249 at 88 (1979), *reprinted in* 12979 U.S.C.C.A.N. 381, 474.

Here, the ITC did not neglect the evidence of underselling, but found that competition between subject imports and the domestic like product was "attenuated by differences between the two in various non-price factors[.]" *Remand Results* at 16–17 ("While underselling has existed throughout the period, we find that the persistent price gap between subject imports and domestic prices is largely due to various differences between the domestic and imported products. . . .").

2. *The ITC's Finding that Underselling Did Not Have a Significant Effect on Domestic Price Levels Is Supported by Substantial Evidence and Otherwise in Accordance with Law.*

First, the ITC found that "[a]ccording to purchasers, quality, availability, and delivery are the most important non-price factors when choosing a supplier. . . ." *Remand Results* at 17–18. U.S. Steel argues that the ITC never found a significant difference in quality between the domestic product and the subject imports. Pl.'s Comments at 6. This argument is irrelevant, as the ITC explicitly noted that "purchasers overwhelmingly listed quality as the most important factor in purchasing decisions." *Remand Results* at 18 n.72. Moreover, price was listed as the most important factor by only three of the thirty purchasers. *Id.*

Second, the ITC found that "when purchasers find a reliable supplier, they rarely change." *Id.* at 18. On a related note, the ITC found that "[t]he stablility of supplier-purchaser relationships . . . , even in the face of price fluctuations, can be seen in the prevalence of the honoring of contracts. . . ." *Id.* U.S. Steel contends that, in fact, supplier-purchaser relationships were not stable. Pl.'s Comments at 7. U.S. Steel points out that the domestic industry lost significant sales to subject imports, and furthermore that U.S. producers were forced to renegotiate nearly one-fifth of their contract sales. Pl.'s Comments at 7–8. U.S. Steel's argument ignores the fact that the domestic industry consciously decided to captively consume more cold-rolled steel to produce more lucrative downstream products, like galvanized steel. Joint Respondents' Pre-hearing Brief at 57–58, P.R. 420. Regarding the stability of contracts, the ITC found that more than four-fifths of domestic producers' contract sales were honored, despite severe price declines in the cold-rolled steel market. *Remand Results* at 18.

Third, the ITC found that "subject import prices have generally continued to decline in 1999, while domestic prices have recovered in

certain important segments." *Id.* at 19. U.S. Steel counters that there was no "recovery" in domestic prices and cites to evidence showing that "while domestic prices . . . improved slightly from Q2 1999 to Q3 1999, those prices remained well below prices for Q3 1998." Pl.'s Comments at 8. What is clear, however, is that domestic prices actually increased during the period when underselling was at its greatest. *See* Def.-Intvrs.' Response at 10.

Fourth, the ITC found that "purchasers generally regard domestic producers as being the price leaders in the market. . . ." *Remand Results* at 19. U.S. Steel argues that, because only 16 of 41 purchasers reported being able to identify a price leader, it is plainly not correct that purchasers "generally" regard domestic producers as the price leader. Pl.'s Comments at 9. The Court finds as the ITC pointed out, that no purchaser mentioned any subject importer or subject producer as a price leader. *Remand Results* at 19.

Accordingly, the Court holds that the ITC's finding that underselling did not have a significant effect on domestic price levels is supported by substantial evidence and otherwise in accordance with law.

B. The ITC's Finding that the Persistent Price Gap Between Subject Imports and the Domestic Like Product Was Due to Factors Other than Underselling Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

The ITC found that the decline in domestic prices was a result of other competitive conditions, specifically: (1) growing competition within the domestic industry; (2) the decline in hot-rolled steel prices; and (3) a strike at General Motors Corporation ("GM").

First, the ITC determined that "the large and growing number of domestic participants in [the cold-rolled steel] market has increased competition within the domestic industry. . . ." *Remand Results* at 20. U.S. Steel contends that the increase in domestic producers was minimal. Pl.'s Comments at 10–11. The ITC based its finding on "the competitive advantages accruing to minimills and the decline in scrap prices during the period under investigation." *Remand Results* at 20. The Court finds that the ITC reasonably determined that cold-rolled steel produced by minimills exerted downward pressure on domestic prices, despite their small number and size, because of their different production inputs.[4] *See id.* None of the other arguments presented by U.S. Steel undercuts the substantial evidence supporting the ITC's finding.

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[4] Minimills use scrap, as opposed to slab, as the primary input for hot-rolled steel. Def.-Intvrs.' Response at 12. Hot-rolled steel, in turn, is the primary input for cold-rolled steel. *Id.* Thus, the decline in scrap prices noted by the ITC enabled minimills to reduce their prices for cold-rolled steel. *Id.*

Second, the ITC found that a "decline in hot-rolled prices likely put downward pressure on the domestic industry's cold-rolled prices. This downward pressure is likely [in part] because of the historic relationship between hot-rolled costs and prices and cold-rolled prices. . . ." *Id.* The ITC further noted that "[f]alling hot-rolled prices have been particularly beneficial to re-rollers, who purchase, rather than produce, hot-rolled steel for cold-rolling." *Id.* U.S. Steel argues that there is "no evidence that hot-rolled prices *caused* the decline in cold-rolled prices." Pl.'s Comments at 13. Furthermore, U.S. Steel disputes the notion that re-rollers, rather than imports, drove down domestic prices, pointing out that re-rollers only accounted for a very small percentage of domestic production in 1998, and that imports frequently undersold re-roller shipments in 1998 and interim 1999. *Id.* at 12. To support its finding, the ITC cited the testimony of Jim Bouchard, a witness for U.S. Steel, who stated:

> If you look at hot roll versus cold roll, specifically, if you question over the past 20 years the relation between pricing has rotated between \$95 a ton from hot roll, cold roll being \$95 to about \$110 a ton. The relationship has stayed intact the past 20 years and right now is running between \$100 to \$110.

Remand Results at 21 n.89. The Court finds that this historical relationship has not been rebutted by evidence in the record. Nor can it be established that this historical relationship is not present in this case. Moreover, the ITC reasonably determined that cold-rolled steel produced by re-rollers exerted downward pressure on domestic prices, despite the low percentage of total production that they constitute. *Id.* at 20.

Third, the ITC identified a strike at GM lasting from June 5 to July 30, 1998, as yet another factor contributing to the decline in domestic prices. *Id.* at 21. Approximately 80 percent of overall GM purchases of flat-rolled steel products are of cold-rolled and corrosion-resistant steel. *Id.* As a result of the strike, GM estimated that 685,000 tons of flat-rolled steel products (550,000 tons of which were cold-rolled steel) were not purchased by GM or its suppliers. *Id.* U.S. Steel contends that subject imports had a greater impact on cold-rolled domestic prices than the GM strike. Pl.'s Comments at 14. It is undisputed, however, that the fall in domestic shipments as a result of the GM strike was greater than the rise in subject imports in 1998. *See id.* at 14–15; Def.-Intvrs.' Response at 17–18. Furthermore, the ITC noted that the majority of domestic producers and importers reported that the strike "had a significant effect on the market in 1998, temporarily reducing demand and causing an oversupply of cold-rolled steel products." *Remand Results* at 21.

Accordingly, the Court holds that the ITC's finding that the price gap between domestic cold-rolled steel and subject imports was due to growing competition within the domestic industry, a decline in

hot-rolled steel prices, and a strike at GM is supported by substantial evidence and otherwise in accordance with law.

III. *CONCLUSION*

For the foregoing reasons, the Court sustains the ITC's *Remand Results.* Judgment will be entered accordingly.

Slip Op. 04–148

HUAIYANG HONGDA DEHYDRATED VEGETABLE CO., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASS'N, CHRISTOPHER RANCH, L.L.C., FARM GATE, L.L.C., THE GARLIC CO., VALLEY GARLIC, and VESSEY AND CO., Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 03–00636

[On challenge by producer/exporter to decision of U.S. Department of Commerce to rescind administrative review of same, judgment for the defendant.]

Decided: November 22, 2004

deKieffer & Horgan (*J. Kevin Horgan*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Civil Division, Commercial Litigation Branch, United States Department of Justice, (*Stefan Shaibani*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Scott D. McBride*), of counsel, for the defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey*), for the defendant-intervenors.

OPINION

In this action, Huaiyang Hongda Dehydrated Vegetable Company ("Hongda"), a producer or exporter of fresh garlic from the People's Republic of China (PRC), contends the International Trade Administration of the U.S. Department of Commerce ("Commerce") improperly rescinded the annual administrative review of the antidumping order on importations of garlic from the PRC that was initiated prior to completion of Hongda's new shipper review. *See Fresh Garlic From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 68 Fed. Reg. 46580 (Aug. 6, 2003). *See also Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59209 (Nov. 16, 1994). Alternatively, Hongda complains that the 376.67% country-wide dumping margin from the 1994 investigation has been discredited and therefore its continued application to Hongda is arbitrary, capricious and other-

wise not in accordance with law. However, the Court sustains the rescission of the administrative review and concludes that it lacks jurisdiction to hear argument on the continued viability of the 1994 country-wide margin.

Background

During the anniversary month of publication of an antidumping duty order, a domestic interested party with respect to named exporters and producers covered by the order, and an exporter, producer or importer with respect to subject merchandise entered during the relevant period of review, may request Commerce to conduct an administrative review. *See* 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.213(b). *See also* 19 U.S.C. § 1677(9) ("interested party" defined). In addition to assessment on entries during the period of review, administrative review establishes a new cash deposit rate on future entries of subject merchandise. *See* 19 U.S.C. § 1675(a)(2)(C).

The administrative record reveals that Commerce published a notice of opportunity to request an annual administrative review of the antidumping order in the Federal Register on November 1, 2002, before the preliminary results of Hongda's new shipper review had been completed.[1] The domestic industry petitioners then requested review of several respondents including Hongda, and the administrative review was initiated on December 26, 2002. *See* R 3; R 5.[2] Hongda did not at the time submit a similar request.

After initiation of the review, the domestic industry petitioners submitted a memorandum to Commerce alleging that they had uncovered "massive" under-reporting of U.S. sales by Hongda and two other respondents. *See* R 49 (Apr. 1, 2003); Confidential Administrative Record Document 6 (Apr. 1, 2003). The petitioners compared import statistics with information[3] on the three respondents including Hongda which accounted for "virtually" all of the imports of garlic from the PRC during the relevant period and alleged that two and a half times the amount of garlic from the PRC had entered the U.S. during the time as compared with what had been reported. *Id.* at 2. They therefore requested that Commerce, in consultation with the

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[1] *Cf. Antidumping or Countervailing Duty Order, Finding or Suspended Investigation: Opportunity to Request Administrative Review*, 67 Fed. Reg. 66612 (Nov. 1, 2002), Administrative Record Document ("R") 1 (covering the period Nov. 1, 2001 to Oct. 31, 2002); *Fresh Garlic from the People's Republic of China: Rescission of New Shipper Antidumping Review and Initiation of New Shipper Antidumping Duty Review*, 67 Fed. Reg. 44594 (July 3, 2002) (covering the period Nov. 1, 2001 to Apr. 30, 2002).

[2] *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78772 (Dec. 26, 2002). In light of the period covered by the new shipper review, the administrative review of Hongda would have examined Hongda shipments between May 1, 2002 and October 31, 2002.

[3] The domestic industry's allegation with respect to Hongda was based upon certain information submitted at the new shipper review.

(former) U.S. Customs Service,[4] investigate further and apply adverse inferences if indeed these respondents had under-reported. *See id.* at 11. It appears that the petitioners, still desiring investigation, re-alleged under-reported sales and transhipment soon thereafter. *Cf.* R 55 (Apr. 18, 2003) (Commerce memo to file).

At the time, Commerce had not received Hongda's response to the antidumping questionnaire. On the other hand, Commerce had sent the questionnaire addressed to Hongda via its counsel for the new shipper review. *See* R 7 (Dec. 30, 2002). In early April, Commerce learned that such counsel had not been retained to represent Hongda at the administrative review. *See* R 56 (Apr. 22, 2003) (Commerce memo to file). It therefore sent the questionnaire directly to Hongda in the PRC. R 57 (Apr. 23, 2003). Four days later, the domestic industry petitioners requested rescission of the administrative review of Hongda. R 61 (Apr. 28, 2003). The petitioners did not properly serve Hongda with a copy of this withdrawal. *See* Pl.'s Br., App. 7 at 2. *Cf.* R 61 at 5.

Commerce did not immediately act on the domestic industry's request. It did, however, immediately publish the preliminary new shipper review results for Hongda the following day. *Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review*, 68 Fed. Reg. 22676 (Apr. 29, 2003). The results relied upon adverse facts available to impose against Hongda the PRC-wide rate of 376.67 percent, a rate in effect since 1994 that was based upon information contained in the petition "corroborated for the preliminary results of the first administrative review" as well as "corroborated in subsequent reviews to the extent that the Department noted the history of corroboration[.]" *Id.* at 22679–80. The final new shipper review results followed nearly two months later and reiterated the viability of the 1994 country-wide rate for Hongda. *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 68 Fed. Reg. 36767 (June 19, 2003) ("*New Shipper Results*").

A month afterwards, Hongda asserted an interest in proceeding with the instant administrative review, which by this time was approximately eight months after initiation. On July 24, 2003, about a week after filing its notice of appearance, Hongda's counsel met with Commerce officials and purportedly urged continuation of the administrative review due to information that had come to Hongda's attention and that of certain U.S. sureties acting on behalf of certain

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[4] The U.S. Customs Service was reorganized into the United States Bureau of Customs and Border Protection pursuant to the *Homeland Security Act of 2002*, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308, effective March 1, 2003. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. No. 108–32 at 4 (2003). Matters relating to customs fraud crimes were ultimately organized into the U.S. Bureau of Immigration and Customs Enforcement ("BICE"). *See* H.R. Rep. No. 37, 108th Cong., 1st Sess. 2003.

U.S. importers. *See* R 112 (July 25, 2003) (Commerce memo to file); R 107 (July 18, 2003) (notice of appearance). Specifically, in written comments submitted on July 29, 2003, Hongda explained that it opposed rescission of the administrative review on the ground that two fraudulent schemes designed to evade antidumping duties on imports of Chinese agricultural products had been uncovered and that these particularly implicated Hongda's customs and potential antidumping duty liabilities. R 113 (July 29, 2003). Allegedly, certain producers or exporters had been making entries of garlic using Hongda's name and its import bond which had been posted as security during the pendency of the new shipper review for any ultimate antidumping duty liability. *Id. See* 19 C.F.R. § 351.214(e). Therefore, Hongda argued, continuing the administrative review afforded the opportunity to identify legitimate and illegitimate garlic shipments, develop solutions for curtailing the fraudulent abuse of its antidumping reviews with respect to China, and resurrect public confidence in the proper administration of Chinese agricultural imports. *Id.* The domestic industry, however, urged Commerce to proceed with rescission with respect to Hongda the same day. R 115 (July 29, 2003) (Commerce memo to file).

Commerce immediately reported Hongda's allegations of import fraud to the "Chief of the Other Government Agency Branch" of Customs and Border Protection. R 120 (Aug. 1, 2003). Nonetheless, Commerce rescinded the administrative review of Hongda shortly thereafter. *Fresh Garlic From the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 68 Fed. Reg. 46580 (Aug. 6, 2003). The public notice of Commerce's determination stated that rescission of the administrative review was appropriate because customs fraud is within the "statutory purview" of the Bureau of Immigration and Customs Enforcement rather than Commerce, that the domestic industry petitioners had withdrawn their request, that Commerce had not expended significant resources on the review to date, and that Hongda itself had not properly requested the administrative review or had otherwise participated in it until recently. One day later, Commerce extended the deadline for the preliminary administrative review results of the remaining respondents until October 31, 2003. *See Fresh Garlic From the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews*, 68 Fed. Reg. 47020 (Aug. 7, 2003). This action followed.

Jurisdiction and Standard of Review

Jurisdiction is alleged pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). A decision by the administering authority to rescind a particular administrative review must be supported by substantial evidence and be in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

Monthly over the past twenty years, Commerce has published the outstanding orders with anniversary dates for the particular month. The practice amounts to clear notification to all potential interested parties of the opportunity to request an administrative review, as well as indication of Commerce's preference to have all parties interested in proceeding with administrative review submit a written request for same in response to the published notice. *See Ferro Union, Inc. v. United States*, 23 CIT 178, 182, 44 F.Supp.2d 1310, 1316 (1999) (discussing *Potassium Permanganate from the People's Republic of China*, 59 Fed. Reg. 46035 (Sep. 6, 1994)). Once a request for administrative review is submitted, it may be withdrawn, and the administrative review rescinded, within 90 days of the published notice of opportunity, although Commerce "may extend this time limit if the Secretary decides that it is reasonable to do so." 19 C.F.R. § 351.213(d)(1). *Cf. Fuyao Glass Indus. Group Co. v. United States*, 27 CIT ___, Slip Op. 03–99 at 7 (July 31, 2003), (during first 90 days the party requesting administrative review controls whether review is to proceed, if no other party also requests review) *with Sugiyama Chain Co. v. United States*, 18 CIT 423, 430, 852 F. Supp. 1103, 1110 (1994), *aff'd* 60 F.3d 843 (Fed. Cir. 1995) (Commerce has the discretion to accept or reject an interested party's withdrawal of its request for an administrative review pursuant to 19 U.S.C. § 1675(a)(1)). The dispute here concerns this latter provision.

I

Approximately eight months after initiation of the administrative review it was rescinded because Commerce had "not committed significant resources to date" and the "petitioners were the only party to request an administrative review" of Hongda. 68 Fed. Reg. at 46581. Hongda had not complied with the formality of responding to the published notice of opportunity, but at this stage it argues that Commerce's decision was unreasonable when considered against the following: (1) it was not until April 23, 2003, that Commerce finally sent its questionnaire directly to Hongda; (2) the questionnaire was untranslated and no Hongda personnel are fluent in English; (3) Hongda did not at the time have legal counsel for the administrative review; (4) five days after Commerce properly sent the questionnaire to Hongda in the PRC (April 28, 2003), the domestic industry petitioners withdrew their request for administrative review, which was 123 days after the notice of initiation was published (*i.e.*, the *day before* Commerce published the preliminary new shipper review results); and (5) after Hongda retained counsel on July 18, 2003, counsel immediately contacted Commerce and met with Commerce officials on July 24, 2003 and declared Hongda's willingness to fully participate in the administrative review. Hongda further argues that

Commerce's decision was unreasonable since it ignored the alleged import fraud which bears on the magnitude of Hongda's antidumping duty liability. Pl.'s Br. at 7–8.

Most of Hongda's points appear directed toward argument that it had inadequate notice of the administrative review. The Court is sympathetic, but the position is ultimately untenable, for several reasons. First, Hongda requested and participated in a new shipper review, which, like an administrative review, is conducted pursuant to section 751 of the Tariff Act of 1930, as amended. 19 U.S.C. § 1675. *Cf.* 19 C.F.R. §§ 351.214(b) & 351.221(c). Initiation of either type of review is dependant upon knowledge of the anniversary date of the order. *See* 19 C.F.R. §§ 351.213(b), 351.214(d), 351.221(c)(1). Having thus participated in a new shipper review, Hongda cannot persuasively disclaim imputed knowledge of Commerce's administrative review policies and procedures. Furthermore, prior involvement in antidumping duty proceedings concerning the same subject merchandise gives rise, *a fortiori*, to an interest in monitoring for publication of the annual notice of opportunity to request review. *Cf. Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385, 68 S.Ct. 1, 3 (1947) (promulgated regulations were binding on all who sought to come within the Federal Crop Insurance Act regardless of actual knowledge of the regulations or "the hardship resulting from innocent ignorance").

Second, as a general matter, publication in the Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it." 44 U.S.C. § 1507. *See, e.g., Lyng v. Payne*, 476 U.S. 926, 942–43, 106 S.Ct. 2333 (1986); *Stearn v. Dep't of the Navy*, 280 F.3d 1376, 1384 (Fed. Cir. 2002); *Aris Gloves, Inc. v. United States*, 281 F.2d 954 (CCPA 1958), *cert. denied*, 82 S.Ct. 398, 368 U.S. 954 (1962); *Cathedral Candle Co. v. U.S. Intern. Trade Com'n*, 27 CIT ___ n.10, 285 F.Supp.2d 1371 n.10 (2003). While it may be true that constructive notice in the Federal Register of a hearing or opportunity to be heard is geographically explicit only "to all persons residing within the States of the Union and the District of Columbia"[5] and also that there may also be instances where notice by publication is insufficient as a matter of law, "[t]he purpose of the Federal Register Act was to give notice to industry, to general business, or to the people of the country as a whole, of certain action taken by the President under a power granted to him by the Congress, so that such industry, business or the people might have notice of such action and act accordingly." *Aris Gloves*, 281 F.2d at 957–958 (quoting *Toledo, P. & W.R.R. v. Stover*, 60 F.Supp. 587, 596 (N.D. Ill. 1945)). All industries or businesses availed of the "substantial privilege" of doing business within the United States are chargeable

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[5] *See* 44 U.S.C. § 1508.

with knowledge of its laws and the manner of their execution to maintain public order. *Cf. Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 100 S.Ct. 2109 (1980) (taxation nexus); *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 6 Otto 1 (1877) (national privilege is *quid pro quo* for acceptance of national terms).

Third, even imperfect notice does not, necessarily, void agency action undertaken pursuant thereto. *See Brock v. Pierce County*, 476 U.S. 253, 106 S.Ct. 1834 (1986); *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 396 (Fed. Cir. 1996); *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995). The question, essentially, is whether a plaintiff has been substantially prejudiced by the imperfect notice. *E.g., Intercargo*. One may, in fact, be apprized of circumstances amounting to actual or implied notice of the matter invoked by the agency. *See United States v. Elof Hansson, Inc.*, 296 F.2d 779, 48 CCPA 91 (1960); *Hoenig Plywood Corp. v. United States*, 51 Cust. Ct. 336, RD 10569 (1963). Here, it is undisputed that counsel, while representing Hongda at the new shipper review, received the original administrative review questionnaire that Commerce intended to serve upon Hongda. If the transmission of that questionnaire by Commerce to counsel was erroneous, it is understandable. Counsel apparently continued to appear on the service list maintained by the Central Records Unit. *See* 19 C.F.R. § 351.103(c). *See, e.g.*, R 3. Counsel did not alert Commerce to the "error" at the time. It took a further three months and Commerce's initiative to discover that counsel's representation of Hongda did not, at least at the time, extend to the administrative review proceeding. And during that time, counsel's silence furthered the impression that they represented Hongda in successive segments of the administration of the dumping order.

Counsel do not comment further on the document's disposition, but assuming receipt of the questionnaire elicited counsel's surprise, they had three choices: return it, forward it, or ignore it. The ABA Model Rules of Professional Conduct do not specifically require counsel to forward or disclose receipt of *arguendo* extraneous matter to a client, but neither do they suggest ignoring it.[6] Whether counsel had

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[6] Model Rule 1.4 of the ABA Model Rules of Professional Conduct, for example, implores counsel to "keep the client reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation[,]" *id.* at (a)(3) & (b), and Model Rule 1.2(c) allows counsel to "limit the objectives of the representation if the client consents after consultation." Similarly, under the ABA Model Code of Professional Responsibility, Canon 6 spoke on providing competent representation to the client. Counsel aspired, pursuant to EC 6–4, to "safeguard the interests of a client," but are obligated, pursuant to DR 6–101(A)(3), not to neglect a legal matter "entrusted" to them. EC 7–7 reiterated that it is the client who is responsible for making decisions but entitled counsel to make decisions "not affecting the merits of the cause or substantially prejudicing the rights of a client." DR 7–101(A)(3) admonished counsel not to intentionally "prejudice or damage the client during the course of the professional relationship."

a duty to notify the client of the existence of the questionnaire (or, for that matter, to notify Commerce) depended not upon whether the questionnaire pertained to a matter within the scope of the representation, but rather upon whether silence had the potential to bring about "substantial prejudice" to Hongda. If it was not a matter within the scope of representation, then ignoring it might serve a tactical purpose, *e.g.* subsequently being able to claim improper notice and thereby defeating jurisdiction. In accordance with the foregoing, however, that would at best have been an open question at the time, and the Model Rules, in keeping with the Model Code, essentially advise "when in doubt, confer." Truly, the exercise of that discretion ultimately rests with counsel, but to the extent Commerce considered that counsel's receipt of the administrative review questionnaire without apparent further activity mitigated in favor of finding constructive or implied notice in Hongda,[7] such consideration was not an abuse of discretion.

Nor was it an abuse of discretion for Commerce to conclude that Hongda's opposition to rescission and its belated expression of interest in the completion of the administrative review were not on par with a proper written request for administrative review. Hongda's silence subsequent to the review's initiation cannot reasonably be construed as reliance upon the request of another as an expression of interest that the administrative review be conducted. Even if it could, such reliance places one at a disadvantage in arguing that an administrative review should continue if the other withdraws its request, as this matter demonstrates. The record is devoid of any (other) indicia of detrimental reliance, and the Court must defer to Commerce's reasonable policy of having each interested party desiring initiation of an administrative review submit a separate written request to that effect.

Commerce might well have wondered why it was suddenly confronting tactical *volte face* by both parties late in the proceeding. In the final analysis, what appears to have tipped the balance for Commerce was the fact that Hongda had, apparently, been dilatory in asserting its interests. At this stage, even considering the matter in a light most favorable to Hongda, fifty-five days had elapsed between the time Commerce sent the questionnaire to Hongda directly and the time that it finally retained legal counsel to represent it at the administrative review proceeding. Hongda does not here adequately

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[7] On the subject of notice, Hongda also complains that the domestic industry did not properly serve it with a copy of their request to withdraw their administrative review request. The point does not address the impression that Hongda did not properly request or otherwise participate in the administrative review when the opportunity to do so presented itself, nor does it demonstrate substantial prejudice to Hongda since Commerce did not, as above observed, immediately act upon the domestic industry's request but waited a further 55 days before deciding to rescind during which time Hongda had the opportunity to fully express its opposition to recision to Commerce.

explain why it took nearly two months to initiate contact with Commerce to declare that it wanted to "fully participate." Instead, Hongda offers for consideration *Ferro Union, supra*, 23 CIT 178, 44 F.Supp.2d 1310, which stated that "the legislative history of 19 U.S.C. 1675(a) indicates that Congress intended to limit reviews in which no one had an interest, and Commerce should rightly continue a review in which there is an expressed interest." Pl.'s Br at 8 (quoting 23 CIT at 181, 44 F.Supp.2d at 1315). Hongda also draws attention to the statement that in administrative reviews "involving multiple parties, Commerce has only granted termination when no other party objected to the termination." *Id.* (quoting 23 CIT at 182, 44 F.Supp.2d at 1316).

It is worthwhile for this Court to agree, even emphasize again, that "Commerce should rightly continue a review in which there is an expressed interest," but the matter here is not considered pursuant to a *de novo* standard of review. *Ferro Union* imposes no limitation on Commerce's consideration of a withdrawal of interest in an administrative review by the interested party which requested it. Rather, the case sustained Commerce's decision to reject an attempt by the domestic steel industry to terminate that administrative review, and the reference in *Ferro Union* to reviews "involving multiple parties" addresses the situation of multiple properly-submitted written requests for administrative review. That is not the situation here, which is rather analogous to *Potassium Permanganate from the People's Republic of China, supra*, 59 Fed. Reg. 46035. As in that matter, also described in *Ferro Union*, Commerce has rescinded an administrative review over the objection of a respondent which has not filed its own request for administrative review. *See* 23 CIT at 182, 44 F.Supp.2d at 1316. Commerce's decision to rescind administrative review of Hongda is therefore not without precedent.

Lastly, Hongda takes issue with Commerce's determination to rescind despite the fact that "Hongda and several importers expressed concerns pertaining to the rescission of the administrative review of Hongda[.]" That, to say the least, is an understatement: the determination to rescind was predicated in part on reasoning that "the arguments they presented [in opposition to recision] pertain to allegations involving fraud." 68 Fed. Reg. at 46581.

The government concurs that the Bureau of Immigration and Customs Enforcement, not Commerce, is statutorily assigned the task of investigating customs fraud. *See* 19 U.S.C. § 1592. Hongda pleads that the very assertion of fraud rendered the decision unreasonable. Specifically, Hongda argues that "[i]t is in the public's best interest to investigate this claim prior to ordering recision[,]" that as a matter of fundamental fairness it "should be allowed to participate in the review so that [Commerce] could accurately calculate any potential dumping margin", and that the mere assertion of fraud and Hongda's expression on interest in fully participating in the adminis-

trative review rebutted any presumption that rescission with respect to Hongda would be reasonable.[8] However, Hongda does not show how the alleged fraud affected the margin that was applied to it. In fact, there is no connection (*see infra*).

To the extent that the government's rationale implies that import fraud is irrelevant to an administrative review, such a position is unacceptable, due to the potential for skewed review results. Nevertheless, Commerce's position here appears to be that import fraud *per se* is not, without more, a sufficient reason to require that an administrative review proceed in the face of withdrawal of interest in the review by the sole party that properly requested it. Thus, Commerce essentially reasoned that whether the public interest is served by the investigation of customs fraud, proceeding with an administrative review in the first place depends upon an interested party's timely expression of its interest in it. In this matter, Commerce simply concluded that Hongda's expression of interest in the administrative review was belated. On this basis, unfortunately for Hongda, the Court is constrained to conclude that Commerce's consideration of the opposing arguments and its decision to rescind was not an abuse of discretion since it appears to have substantial supporting evidence on the administrative record. There may be instances where actual participation amounts to such a sufficient expression of interest in completing the administrative review that its recision would be unlawful, but this is not one of them.

II

Whether Hongda's allegation of customs fraud is true, its position has not been worsened as a result of the recision of the administrative review. The margin that continued to be applicable as a result of recision, *i.e.*, the new shipper review results, was not determined despite assertion of customs fraud. Nonetheless, Hongda argues that the country-wide margin that was applied to it was not lawfully "determined" since it is merely the country-wide rate from the 1994 investigation. The country-wide rate, Hongda emphasizes, was obtained from the petition and was not corroborated.

Commerce is authorized to rely on "facts otherwise available" in making its determinations if it cannot obtain the information directly. It may also derive an adverse inference if a party has been uncooperative. But, whenever Commerce uses "secondary information" rather than information "obtained" in a review, it is required "to the extent practicable" to corroborate that information. Information from a prior segment of an antidumping proceeding is considered secondary information. *See generally* 19 U.S.C. § 1677e.

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[8] Pl.'s Br. at 7–8. Hongda also notes that the Federal Register notice did not accurately reflect its willingness to fully participate in the administrative review.

Commerce interprets the corroboration requirement to mean that secondary information must have "probative value." *See* Statement of Administrative Action at 870; *Antidumping Duties; Countervailing Duties*, 62 Fed Reg. 27296, 27409 (1997). Thus, on this matter Hongda argues the administrative record contains no indicia of corroboration of secondary information, no memoranda evincing any discussions thereon. In the final analysis, Hongda argues, Commerce did not articulate any reasoning in the recision notice to explain why the country-wide rate continues to be probative.

However, as the government points out, the only action taken by Commerce that is being challenged is the decision to rescind the review itself with respect to Hongda. Commerce made no decision on the merits. Commerce did not "decide" to apply facts available. *See* 19 U.S.C. § 1677e(a). The recision of the administrative review merely continued the margin that was already in effect. Accordingly, there was no determination to use a "facts available" figure that would have otherwise required corroboration. The Court therefore concludes that it lacks jurisdiction over Hongda's claim. Any lack of corroboration in the determination to apply the country-wide figure to Hongda was properly appealable from publication of *New Shipper Results, supra*, 68 Fed. Reg. 36767.

Conclusion

For the foregoing reasons, judgment will enter in favor of the defendant.

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*U.S. G.P.O.: 2004-310-214:80079